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February 12, 1998

VIA HAND DELIVERY

Ms. Magalie Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208

Dear Ms. Salas:

Please find enclosed for filing an original and four copies of BellSouth's Opposition to the Petition of AT&T for Reconsideration.

Please date stamp the extra copy and return it to the individual delivering this package. Thank you for your assistance in this matter.

Sincerely,

William B. Petersen

William B. Petersen

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in South Carolina	CC Docket No. 97-208

To: The Commission

BELLSOUTH'S OPPOSITION TO PETITION OF AT&T CORP. FOR RECONSIDERATION

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In its Petition for Reconsideration, AT&T melodramatically asserts that the Commission's approval of BellSouth's proposed joint marketing approach represents a "radical reinterpretation of the 1996 Act," and a "drastic change in its policy."[1] It is nothing of the kind. The Commission faithfully applied both the Act and the Non-Accounting Safeguards Order[2] to specific facts, as the Commission made clear in its decision.[3] The South Carolina Order also carefully explained the areas in which the Commission's prior Michigan Order was not reconcilable with the relevant statutory language.[4] The Commission's application of section 272(g)'s joint marketing authorization therefore was not a mere reasonable exercise of the Commission's discretion; it was compelled by the statute and Commission precedent and best serves the interests of consumers.

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1. Petition of AT&T Corp. for Reconsideration at i, 5 (filed Feb. 2, 1998) ("AT&T Petition").

2. First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, 11 FCC Rcd 21905 (1996), recon. 12 FCC Rcd 2297 (1997), further recon. 12 FCC Rcd 8653 (1997), aff'd sub nom. Bell Atlantic Tel. Co. v. FCC, 131 F.3d 1044 (D.C. Cir. 1997) ("Non-Accounting Safeguards Order").

3. Memorandum Opinion and Order, Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in South Carolina, FCC 97-418, CC Dkt. No. 97-208, ¶¶ 231-239 (rel. Dec. 24, 1997) ("South Carolina Order").

4. Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan, FCC 97-298, CC Docket No. 97-137 (rel. Aug. 19, 1997) ("Michigan Order").

I. THE COMMISSION'S APPROVAL OF BELLSOUTH'S MARKETING PLAN IS CONSISTENT WITH THE REQUIREMENTS OF THE ACT AND THE NON-ACCOUNTING SAFEGUARDS ORDER

In its South Carolina Order, the Commission concluded that "a BOC, during an inbound telephone call, should be allowed to recommend its own long distance affiliate, as long as it contemporaneously states that other carriers also provide long distance service and offers to read a list of all available interexchange carriers in random order." South Carolina Order ¶ 237. As the Commission determined, this conclusion is consistent with both the Act and the Non-Accounting Safeguards Order. Id.

While section 251(g) preserves the BOCs' pre-existing obligation to provide equal access, section 272(g) expressly authorizes the BOCs and their section 272 affiliates to market their services jointly upon receiving interLATA approval. In the Non-Accounting Safeguards Order, the Commission considered how to give both of these provisions effect, and determined that "the continuing obligation to advise new [local] customers of other interLATA options is not incompatible with the BOCs' right to market and sell the services of their section 272 affiliates under section 272(g)." Non-Accounting Safeguards Order, 11 FCC Rcd at 22047, ¶ 292. In particular, by notifying the local customer that other carriers provide long distance service and offering to read a random list of these carriers, a BOC complies with the equal access requirement of section 251(g) with respect to inbound calls. Thus, the Commission concluded that "a BOC may market its affiliate's interLATA services to inbound callers, provided that the BOC also informs such customers of their right to select the interLATA carrier of their choice." Id. In reaching this conclusion, the Commission cited with approval a joint marketing script that

NYNEX had submitted in that rulemaking; this script was similar to the marketing script proposed by BellSouth and approved in the South Carolina Order. Id.

In its Michigan Order, the Commission departed from the approach required by the Act and suggested by the Non-Accounting Safeguards Order when considering a specific plan put forward by Ameritech. As the Commission has acknowledged, in the Michigan Order it "placed too much weight on the equal access obligations, and too little weight on the BOCs' right to joint market local and long distance services." Id., 11 FCC Rcd at 22018, ¶ 238. The Commission consequently disapproved the particular script suggested by Ameritech. Michigan Order ¶ 376.

Carrying the Michigan Order to its illogical extreme, AT&T subsequently argued that BOCs may "take full advantage of their joint marketing authority"under section 272(g) only during outbound calls, not during inbound calls.[5] That the Michigan Order could be used to support this proposed curtailment of a statutory right illustrated the need for the Commission to revisit the issue — which the Commission quite properly did in its South Carolina Order. But contrary to AT&T's claim, it was only a portion of the Michigan Order, not the equal access requirements of the Act or the Non-Accounting Safeguards Order, that was repudiated by the South Carolina Order.

Allowing the BOCs to engage in joint marketing during inbound calls does not "displace" or "partially repeal" the equal access obligations of section 251(g), as AT&T contends. AT&T Petition at 8. In the Non-Accounting Safeguards Order, the Commission observed that under "existing [equal access] requirements," as preserved by section 251(g), the BOCs must continue

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[5] Comments of AT&T in Opposition to BellSouth's Section 271 Application for Louisiana, at 77, CC Dkt. No. 97-231 (filed Nov. 25, 1997).

"to inform new local exchange customers of their right to select the interLATA carrier of their choice and take the customer's order for the interLATA carrier the customer selects." Non-Accounting Safeguards Order, 11 FCC Rcd at 22047, ¶ 292.[6] The South Carolina Order tracks this earlier holding nearly word for word. South Carolina Order ¶ 237.

In addition to misrepresenting prior Commission precedent, AT&T attempts to bury in a footnote the central fact that undermines its entire argument: there is no exception for inbound calls in section 272(g). According to AT&T, since section 251(g) "similarly contains no exception that would exclude from its coverage a BOC's marketing efforts on behalf of its affiliate," the lack of limiting language in section 272(g) is of "[n]o significance." AT&T Petition at 6-7, n.5. The fact that section 251(g) does not expressly reference section 272(g) does not lead to the conclusion that the former section should trump the latter, as AT&T contends. Rather, the two sections must both be given effect, as the Commission has done in its South Carolina Order.[7] While the Commission's interpretation of section 272(g) is fully consistent with the equal access requirements referenced in section 251(g) and maintains a balance between the two sections, AT&T's interpretation of section 272(g) would effectively eliminate the

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[6] See also Letter from Susanne Guyer, Executive Director, Federal Regulatory Policy Issues, NYNEX to William F. Caton, Acting Secretary, Federal Communications Commission, Dkt. No. 96-149, at 3 (Oct. 23, 1996) (cited in Non-Accounting Safeguards Order, 11 FCC Rcd at 22047, n.759.

[7] See Bennett v. Spear, 117 S. Ct. 1154, 1166 (1997) ("It is the cardinal principle of statutory construction [that courts must] give effect, if possible, to every clause and word of a statute . . . rather than emasculate an entire section.") (internal quotation marks omitted); Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obligated to give effect, if possible, to every word Congress used.").

authority conveyed by this provision with respect to a whole category of potential BOC joint marketing.

AT&T also asserts in its footnote that because section 272(g) "is styled as a bar to BOC marketing efforts before interLATA authority is granted, rather than as an affirmative grant of such marketing authority after interLATA approval, it simply would make no sense for there to have been an express 'exception' that precluded marketing practices that were in conflict with the equal access requirements." AT&T Petition at 7 n.5. This assertion assumes away the core issue — the consistency of notifying customers about their choice of carriers with equal access principles. Moreover, it is factually incorrect: Section 272(g)(3) expressly states that joint marketing is affirmatively "permitted under" section 272(g). AT&T's argument also proves too much. To the extent that section 272(g) is "styled as a bar" to BOC marketing efforts, this bar would pertain to all joint marketing, not just inbound joint marketing; yet this is an untenable construction, given the express language of section 272(g)(3).

Otherwise unable to support its position, AT&T returns to its last refuge — an insinuation that BellSouth cannot be trusted, and therefore the terms under which BellSouth operates its section 272 affiliate must be made more stringent than those required by the Act. This tired rhetorical device should by now be a signal to the Commission that AT&T has no legal or statutory support for its position.

According to AT&T, if BellSouth is allowed to engage in meaningful joint marketing during inbound calls, BellSouth will "abuse" its position and improperly "steer" callers to its section 272 affiliate. AT&T Petition at 9. AT&T simply gives no weight to the Commission's requirement that BOCs must inform inbound callers that they have a choice of interexchange

carriers and offer to list the range of carriers before carrying out any joint marketing, which ensures that the BOCs cannot obtain an unfair advantage. South Carolina Order ¶ 239. Indeed, unless a BOC can engage in joint marketing during inbound calls following in-region, interLATA relief, inbound callers may assume that the BOC still does not offer interLATA services. AT&T's real fear about joint marketing is therefore that consumers may learn they can obtain their long distance service from a Bell company they know and trust. With its marketing muscle and entrenched market share, AT&T would prefer that consumers receive as little useful information about their options as possible, but instead be deluged with random lists of unfamiliar providers, so that these callers, out of ignorance and exasperation, will stay with the carrier they already know and probably

use — AT&T.

Finally, AT&T's dark suggestion that "to permit marketing of any kind relating to interexchange services on inbound calls would grant BOCs a valuable and significant power that they have heretofore never possessed," AT&T Petition at 10, is simply an effort to reopen debate on the 1996 Act. It is true that the BOCs have never before had the "power" jointly to market local and in-region, interLATA services, but that is because the Bell companies have never before had the opportunity to offer these interLATA services. Congress determined that the Bell companies (just like CLECs) should have the right to market "one-stop shopping" options, and that is the end of the matter.

II. THE COMMISSION'S CORRECTION OF THE MICHIGAN ORDER WAS NOT AN ABUSE OF DISCRETION

Ignoring the plain language of the South Carolina Order, AT&T also makes a procedural objection that this decision was "an abrupt repudiation of . . . [the Commission's] prior rulings . . . without an adequate reasoned basis." AT&T Petition at 1. In fact, the South Carolina Order did not modify pre-existing equal access requirements or overturn the Non-Accounting Safeguards Order. The Commission explained that it was recognizing the equal access requirements presented by the Act, and applying them. South Carolina Order ¶ 239. While it did disavow the Michigan Order on the issue of joint marketing, the Commission did so for a fully explained reason: the Michigan Order was at odds with the Act. Id.

AT&T attempts to elevate the Michigan Order into a binding rulemaking. But the relevant discussion of the Michigan Order consisted of a single paragraph, one of several "areas of concern" that the Commission indicated it might "examine more closely" in a future section 271 application. Michigan Order ¶ 348. See also Order on Motions for Enforcement of the Mandate, Iowa Utils. Bd. v. FCC, No. 96-3321, slip. op. at 5 (Jan. 22, 1998) (noting that the Commission in its Michigan Order offered advisory guidance on issues that it did not decide as part of Ameritech's application).[8]

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[8] Because the Michigan Order was not a rulemaking, AT&T's reliance on Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins., 463 U.S. 29 (1983) is misplaced. In State Farm, the Court addressed the question of what is required of an agency when it decides to rescind a formal rule — a far cry from this situation, in which the Commission explained that it was acting to bring its position in adjudications in line with a prior rulemaking, and, more importantly, with statutory requirements.

Likewise, in arguing that the Commission "errs by purporting to change the equal access requirements without issuing regulations to replace them," AT&T Petition at 13, AT&T relies on the same false contention upon which its whole petition is based: that the South Carolina Order violates the equal access requirements preserved through section 251(g). The Commission carefully considered BellSouth's joint marketing plan and concluded that it satisfies existing equal access requirements. South Carolina Order ¶ 238. There was no "change" to the equal access requirements, and therefore there was no need for new regulations.

As for the Michigan Order, AT&T would have this Commission believe that it could never alter its position without conducting a formal rulemaking — even when its position was at odds with a statutory requirement. But as the Supreme Court has held, "the mere fact that an agency interpretation contradicts a prior agency position is not fatal. . . . [c]hange is not invalidating, since the whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency." Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1734 (1996); see also National Ass'n for Better Broadcasting v. FCC, 849 F.2d 665, 669 (D.C. Cir. 1988) (agency need only provide "reasoned explanation" when departing from prior conclusions). AT&T does not acknowledge that the Commission has this discretion, because to do so would be fatal to its position.

Again confusing the Commission's fact-specific review of BOC applications under section 272 with rulemaking proceedings, AT&T for the first time proposes "reasonable alternatives" that it claims that the Commission failed to consider. AT&T Petition at 10. The only "alternatives" properly before the Commission in this proceeding are those presented in

BellSouth's application. AT&T's "alternatives," moreover, pay lip service to the BOCs' statutory right to engage in joint marketing, while in effect eviscerating this right.

For example, AT&T suggests that BOCs be required to "postpone" their marketing efforts until after they have advised the customer that he or she has a choice of interexchange carriers; read the full list of interexchange carriers; and heard the customer indicate that he or she still cannot select an interexchange carrier. AT&T Petition at 12. According to AT&T, only after all of this has occurred should a BOC be allowed to undertake joint marketing. Id. Thus, under AT&T's plan, consumers would be forced to listen to a random list of interexchange carriers that might last eight minutes or more,[9] and only those patient (and indecisive) enough to sit through this recitation without making a decision would receive the benefits of joint marketing. A far more likely outcome (as AT&T acknowledges) is that customers would choose a familiar incumbent long distance carrier rather than listen to the whole list[10] — a situation that benefits AT&T and the other members of the Big Three, rather than consumers.

AT&T's Petition should be denied.

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[9] See Comments of Bell Atlantic on Petitions for Reconsideration at 2, CC Docket 97-137 (filed Oct. 9, 1997).

[10] See AT&T Petition at 11 n.8 (conceding that in practice BOCs do not finish reading the complete "random list" of IXC carriers, but only a portion "until the customers indicate their selection"). Nor should this result be surprising, since for over a decade customers have been informed, through required equal access notifications, advertising, and direct solicitations by interexchange carriers, that they may choose a long distance carrier.

Respectfully submitted,

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February 12, 1998

CERTIFICATE OF SERVICE

I, Bernadette Murphy, hereby certify that on this 12th day of February, 1998, I caused copies of BellSouth's Opposition to Petition of AT&T for Reconsideration to be served by first class mail (or by other service method indicated) upon the parties on the attached service list.

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